83 - 1347

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1983

UNIGARD INSURANCE COMPANY,
Petitioner,

v.

FORMICA CORPORATION and
AMERICAN CYANAMID COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DATED: February 10, 1984

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QUESTION PRESENTED

Whether a federal court with jurisdiction over an action solely on the basis of diversity of citizenship may disregard controlling state case law and instead rely upon inapposite federal interpretations of state law.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings below remain as petitioner or respondents in this proceeding.

Petitioner's subsidiaries and affiliates are: Unigard Olympic Life Insurance Company; Unigard Service Corporation; Unigard Risk Technology, Inc.; Unigard Indemnity Company.

Respondent Formica Corporation is a subsidiary of American Cyanamid Company. Other subsidiaries of American Cyanamid Company are unknown to petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Unigard Mutual Insurance Company respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered on August 26, 1983.

OPINIONS BELOW

The unpublished memorandum opinion of the Court of Appeals for the Ninth Circuit, Unigard Insurance Company v. Formica Corporation and American Cyanamid Company (Nos. 82-4326 and 82-4444) appears, along with the order denying rehearing and rehearing *en banc*, as Appendices A and B, respectively. The unreported order and judgment of the District Court for the Northern District of California appear as Appendices C and D, respectively. Pertinent excerpts from the District Court's oral decision appear as Appendix E.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals for the Ninth Circuit entered judgment on August 26, 1983, and Unigard timely filed petitions for rehearing and rehearing *en banc*. The Court of Appeals denied those petitions on November 14, 1983.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1652 provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This case involves the atypical refusal by both the Court of Appeals for the Ninth Circuit and the District Court for the Northern District of California to apply controlling California case law in an action where jurisdiction is based solely on diversity of citizenship. The Court of Appeals has erroneously affirmed an award of summary judgment against petitioner based upon an uncharacteristically misguided application of inapposite federal decisions. The Ninth Circuit decision thus stands in direct conflict with a line of established California appellate decisions and its refusal to follow that plainly applicable state authority constitutes grounds for review by this Court. *Six Companies of Cal. v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940); *West v. American Teleph. & Teleg. Co.*, 311 U.S. 464 (1940); *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940).

The District Court initially perpetrated the error by recognizing the existence of controlling California authority but then rejecting it in favor of relying upon one inapplicable Ninth Circuit decision interpreting California law and a separate district court opinion construing Louisiana law. Never since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) has this been permissible. The Court of Appeals sanctioned this error by refusing even to consider established California authority although both petitioner and respondents briefed and argued the appeal based on California case law. Petitioner comes before this Court seeking issuance of a writ of certiorari to correct a serious miscarriage of justice.

Factual Background.

In this action, Unigard Mutual Insurance Company [hereinafter "Unigard"] seeks to recover from Formica Corporation [hereinafter "Formica"] and American Cyanamid Company [hereinafter "Cyanamid"], Formica's parent company, amounts expended by Unigard in settlement of certain personal injury claims made against Formica and Cyanamid. Unigard had issued a policy of excess liability insurance to Roberts Consolidated Industries [hereinafter "Roberts"] which, beginning in 1969, manufactured, under contract with Formica and pursuant to Formica's specifications, an adhesive product marketed by Formica under the name "Formica Brand Brushable Contact Adhesive No. 140" [hereinafter "Formica 140"]. Respondent Cyanamid had authority and control over the content of warning and precautionary statements placed on Formica 140 product containers.

Two of the personal injury claims were made by Kathleen and Orville L. Smith, who sued Formica and Cyanamid in the United States District Court for the District of Nebraska. The other claims were made by Bertha and Lloyd Ljunggren, who did not file suit. Unigard's insured, Roberts, was not named as a defendant in the Smith's action.

The Smith and Ljunggren claims arose out of an explosion and fire which occurred on January 24, 1975, near Aurora, Nebraska. The claimants were in the process of installing a Formica brand counter top on a kitchen cabinet in the Ljunggren home, using "Formica Brand Brushable Contact Adhesive No. 140" ["Formica 140"], when vapor from the adhesive ignited, causing a flash fire and explosion which resulted in serious personal injuries. The gravamen of the Smith and Ljunggren claims was that the warning and precautionary statements on the Formica 140 container label were inadequate, and failed to provide the claimants with information necessary to safely use the product.

The contract under which Roberts had undertaken to manufacture Formica 140 included the following provisions:

1. Roberts agreed to manufacture Formica 140 according to certain specifications provided by Formica and appended to the contract;

2. Roberts agreed to package and label the product in accordance with the specifications set forth in the contract, and in accordance with any further written instructions provided by Formica;

3. It was provided that "[Formica's] label instructions shall be limited primarily to artwork and the

precautionary statements on the label shall be suggested by [Roberts], *subject to Formica's approval.* . . .";

4. Roberts agreed to "indemnify and hold [Formica] harmless from all losses, costs, expenses, claims, and demands caused by or arising out of the manufacture, sale, handling, storage, quality, labeling, and use" of Formica 140, *"except for losses resulting from the negligence of [Formica]";*

5. Roberts agreed to maintain certain insurance coverage, including comprehensive general liability insurance, with specified limits. The comprehensive general liability insurance was to include both Formica and Cyanamid as additional insureds, *"but only as respects the liability of [Roberts] arising from the contract".*

(Emphasis added.)

Roberts' manufacturing and packaging activities were undertaken at the behest of Formica, and were carried out according to Formica's directions and specifications. Operations regarding the content of label text and format were carried out by Formica, and by the "Label Committee" of Cyanamid.

John A. Evans, Jr., was Market Planning Manager at Formica Corporation between March 1973 and June 1980. In this capacity Evans acted as liaison between the Research and Development Department at Formica and the Label Committee at Cyanamid on the one hand, and suppliers of the Formica 140 product, such as Roberts, on the other. Formica provided its suppliers use instruction language, warning language, the Formica logo, and colors and format for the label.

Evans' department obtained the use instruction information that was passed on to suppliers of the Formica 140 product from the Research and Development Department at Formica. Warning and precautionary language was obtained from the Label Committee at Cyanamid, and the logo or format for presentation of the Formica insignia and colors were obtained from the Formica Corporation Advertising Department. With respect to warning and precautionary language specifically, the Label Committee at Cyanamid decided what language would appear on the label and this information was transmitted through Evans' department to the various suppliers of the Formica 140 product.

It is Unigard's contention that Formica and Cyanamid were negligent or otherwise at fault, and were legally responsible in whole or in part for the injuries which gave rise to the Smith and Ljunggren claims.

Procedural Background.

Unigard filed this action in the Superior Court of California, for the City and County of San Francisco. Formica and Cyanamid removed the action to the United States District Court for the Northern District of California on December 28, 1979, on diversity of citizenship grounds.

On September 18, 1981, Formica and Cyanamid filed a motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, requesting the District Court find, as a matter of law, that:

1. Formica and Cyanamid were "additional assureds" under definition clauses 1(b) and/or 1(c) of the Unigard policy;

2. Unigard had waived or was estopped to assert its right to recover the sums expended by it in settlement of the Smith and Ljunggren claims; and

3. Unigard had failed to reserve its right to contest Formica's and Cyanamid's claims to coverage under the Unigard policy.

On October 16, 1981, the District Court denied the motion for summary judgment as to all issues raised, the court determining that material factual questions remained for trial with regard to each issue.

Thereafter, on November 16, 1981, pursuant to Formica's oral motion for reconsideration of its previously denied summary judgment motion, and on the basis of trial briefs and supplementary briefs filed by the parties at the court's invitation, the District Court reconsidered the issue of Formica's and Cyanamid's claimed status as "additional assureds" under definition 1(b) of the Unigard policy. At the hearing, the court indicated its intention to grant summary judgment in favor of Formica and Cyanamid, on the ground that they qualified as "additional assureds". (See Appendix E.) The court requested additional briefing, however, regarding certain limiting language in the definitional clause of the policy.

A further hearing was held on March 19, 1982. At that time, the District Court granted Formica's and Cyanamid's motion for summary judgment, holding that under definition 1(b)[1] of the Unigard policy, Formica and Cyanamid were "additional assureds". (See Appendix C.)

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[1]Definition 1(b) is set forth in the text at pp. 10-11 *infra*.

Unigard timely appealed to the Court of Appeals for the Ninth Circuit for review of the District Court's decision. After briefing and oral argument, the Ninth Circuit affirmed the lower court's decision on August 26, 1983. (See Appendix A.) The Ninth Circuit, although purporting to apply California law, did not address controlling California appellate decisions even though both petitioner and respondents had briefed and argued the appeal based on California law. Unigard filed timely petitions for rehearing and rehearing *en banc*, which were denied on November 14, 1983. (See Appendix B.)

REASONS FOR GRANTING THE WRIT

Central to the dispute between these litigants is the question whether extrinsic evidence should have been considered by the District Court in ascertaining the meaning of Unigard's policy. The District Court refused to consider such evidence despite a clear holding by the California Supreme Court in *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage Etc. Co.*, 69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968), that, in California, a court must ascertain and give effect to the intention of contracting parties by determining through reference to extrinsic evidence what the parties meant by the words they used. The Ninth Circuit's affirmance is likewise contrary to this and other California appellate decisions governing contract interpretation.

The District Court specifically acknowledged the existence of controlling California authority[3] but refused to apply it. The relevant portion of the trial court's oral

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[3]*Dart Equipment Corp. v. Mack Trucks, Inc.*, 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970), which follows *Pacific Gas, supra.*

decision appears in Appendix D. The transcript shows *inter alia* that the Court stated:

> The plaintiff relies on a California Court of Appeal case, decided in the Second District by Division Five, and written by a Superior [Court] Judge, Judge Frampton, who was assigned pro tem to the court, in which the Judge stated, and I quote in part: "It is a general rule that the intent and meaning of the parties is far more important than the strict literal sense of the words used in the insurance contract. For that reason it is equally important to consider the subject matter of insurance and the purpose or object which the parties had in view at that time."
>
> That may be a general principle applicable to the peculiar facts in that case. But I do not think that it applies in the case at bar; and in any event it is—appears to me to be directly contra to the holding of Judge Sneed in the *Price* [*v. Zim Israel Navigation Co. Ltd.*, 616 F.2d 422 (9th Cir. 1980)] case.
>
> Accordingly, I . . . having granted the motion for reconsideration and having heard for the second time the motion for summary judgment, I now reverse my decision in the first hearing, and grant summary judgment in favor of the defendant.[3]

Petitioner cited the California authority to the Court of Appeals in oral argument and in briefs filed with that court. The Ninth Circuit, in an uncharacteristically superficial opinion, failed even to address that authority, thus sanctioning the District Court's error. As a result, Unigard

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[3]The District Court also improperly applied a case from the United States District Court for the Eastern District of Louisiana which was based on Louisiana law. *Gulf Oil Corp. v. Mobile Drilling Barge or Vessel*, 441 F.Supp. 1 (E.D. La. 1975).

has been denied a trial on the merits of its case, and is now without remedy except in this Court.

THE NINTH CIRCUIT FAILED TO APPLY CONTROLLING STATE CASE AUTHORITY IN DECIDING AN IMPORTANT QUESTION OF STATE LAW

California not only extensively regulates insurance relationships but has also developed a significant body of law interpreting insurance contracts. Through contract interpretation, the courts can and do additionally regulate and define relationships between insured and insurer.

The question raised in the court below is one of insurance contract interpretation to which California law applies. The issue before the District Court on the motion for summary judgment was whether an insurance policy which provides coverage for liability assumed by contract must be construed to reflect the intent of the parties to the underlying manufacturing agreement. The District Court and the Ninth Circuit answered this question "no". The California courts plainly hold to the contrary.

The District Court and the Ninth Circuit based their decision that Formica and Cyanamid were "additional assureds" on the language of definition 1(b) of the Unigard policy:

> The unqualified word "Assured", wherever used in this policy, includes not only the Named Assured but also —
>
> . . .
>
> (b) Any person, organization, trustee or estate to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance

> such as is afforded by this policy, but only in respect of operations by or on behalf of the Named Assured or of facilities of the Named Assured or used by them.

Applying California case law as expounded by the California Court of Appeal in *Dart Equipment Corp. v. Mack Trucks, Inc.*, 9 Cal.App.3d 837, 88 Cal.Rptr. 670 (1970), the above definition incorporates into the Unigard policy the terms of the written contract entered into by Formica and Roberts (Unigard's insured). Under the provisions of the Roberts/Formica contract, Roberts was obligated to indemnify Formica (but *not* Cyanamid) "except for losses resulting from the negligence of [Formica]." Formica and Cyanamid were entitled to have Roberts maintain liability insurance, but "only as respects the liability of [Roberts] arising from the [Roberts/Formica] contract."

These provisions demonstrate that (1) Roberts agreed to make Formica and Cyanamid additional assureds *only* to the extent of Roberts' *contractual* obligations arising from the Roberts/Formica agreement, and (2) Roberts had *no* contractual obligation to indemnify Formica for losses resulting from the fault of Formica (and no indemnity obligation at all to Cyanamid). It follows that Roberts had no obligation to make Formica and Cyanamid additional assureds under Roberts' liability policies for losses resulting from Formica's or Cyanamid's own fault. Under the authority of *Dart, supra*, the foregoing provisions of the Roberts/Formica contract operated to limit the existence and scope of coverage which potentially was available to Formica and Cyanamid under the Unigard policy.

The District Court rejected *Dart* and instead applied federal decisions interpreting state (California and Louisiana) law which it thought more correct. This is an improper use of the court's power, because *Dart*, as shown in the following discussion, is dispositive of the issue, and thus provides the rule of decision in this case.

Dart, as lessee of ten trucks manufactured and leased by Mack, signed a lease agreement which provided that the lessee, Dart, "shall indemnify and hold [Mack] harmless from and against any and all claims for personal injury or property damage arising out of the use or operation of the vehicle[s]." *Dart*, 9 Cal.App.3d at 848, 88 Cal. Rptr. at 677. The lease agreement further provided that Dart:

> . . . shall carry and keep in force at [Dart's] expense insurance on the vehicle(s) in insurance companies approved by [Mack] against loss or damage by fire, theft, public liability, property damage, and collision . . . with loss, if any, payable to [Mack] and/or its assigns as its interest may appear . . . .

9 Cal.App.3d at 849, 88 Cal.Rptr. at 678.

The trial court received evidence that, at the time Dart and Mack signed the lease agreement, a Mack representative stated to Dart his concern that Mack "have evidence that [Dart] did have insurance which would cover owner's liability or secondary liability for any acts that [Dart] might perform of negligence in the operation of [its] business. . . . [Dart] said [it] would so furnish that insurance." 9 Cal.App.3d at 842, 88 Cal.Rptr. at 673.

Thereafter, Dart caused Mack to be added by endorsement as an additional insured on its policy, which covered

inter alia, bodily injury and property damage, including liability "assumed by the Insured under . . . a warranty of goods or products." The lease agreement provided that Mack furnish a "manufacturer's standard vehicle warranty" to Dart.

Approximately nine months after the parties executed the lease one of Dart's employees was involved in a single vehicle accident while driving one of the leased trucks. A defective steering mechanism in the Mack truck allegedly caused the accident. As a result of lawsuits filed by Dart and its employee, Mack's insurer paid damages and defense costs for breach of warranty liability imposed against Mack. Cross-Complaints were filed by and against Dart's and Mack's insurers, seeking declaratory relief as to the coverage of the respective policies.

Mack contended that it was entitled to coverage under the insurance policy issued to Dart, and the (certificate) endorsement thereto naming Mack as an additional insured. The Court of Appeal noted:

> The amounts of the coverages are set forth in the certificate. The certificate further provides that it is "Issued to Mack Truck Inc. who is hereby made an additional insured but only as respects liability arising out of the use of automobiles in the business of the named insured, by the named insured, his employees or agents."

9 Cal.App.3d at 843, 88 Cal.Rptr. at 674. The certificate stated that it extended to Mack all of the coverages shown in the policy. Dart, on the other hand, contended that it had never agreed to provide insurance protecting Mack against liability based on Mack's manufacturing negligence, and that the endorsement could not afford more coverage than the underlying contractual agreement had contemplated.

The *Dart* court concluded that the scope of the coverage afforded by the policy endorsement necessarily was limited to the coverage Dart had agreed to provide:

> It is . . . a general rule that the intent and meaning of the parties is far more important than the strict literal sense of the words used in the [insurance] contract. For that reason *it is equally important to consider the subject matter of insurance and the purpose or object which the parties had in view at that time.* It is also proper to consider the business of the parties, the circumstances surrounding the making of the contract, the situation of the property, and all other conditions which have a legitimate bearing upon the intention of the parties.
>
> . . .
>
> In the foregoing circumstances *it was proper for the trial court to receive extrinsic evidence bearing upon the intent of the parties in making Mack an additional insured* under Dart's policy with Exchange. This evidence disclosed that *Mack did not ask Dart to obtain coverage for the manufacturer's strict liability* of Mack, *but only sought coverage for any vicarious liability of Mack arising from the negligence of Dart* in the operation of the leased vehicle in the business of Dart. We are of the opinion that there is substantial evidence to sustain the trial court's finding that *the Exchange policy and the certificate of insurance issued thereunder to Mack did not provide coverage to the latter for manufacturer's strict liability* or the breach of warranty liability.

9 Cal.App.3d at 847-48, 88 Cal.Rptr. at 677 (emphasis added; citations omitted).

In so holding, the *Dart* court followed, without discussing, the decision of the California Supreme Court in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage Etc. Co.*,

69 Cal.2d 33, 69 Cal.Rptr. 561, 442 P.2d 641 (1968), which sets forth the rationale for admissibility of extrinsic evidence to explain the meaning of a written instrument under California law. Chief Justice Traynor, writing for the court, stated:

> In this state . . . the intention of the parties as expressed in the contract is the source of contractual rights and duties. *A court must ascertain and give effect to this intention by determining what the parties meant by the words they used.*
>
> . . . [T]he meaning of a writing '. . . can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.'[4]

69 Cal.2d at 38-39; 69 Cal.Rptr. at 564-65, 442 P.2d at 644-45 (emphasis added; footnotes and citations omitted).

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[4]It is worthy of note that *Pacific Gas, supra*, was very close factually to the instant case, as well. In reversing the judgment of the trial court, Justice Traynor stated:

> In the present case the court erroneously refused to consider extrinsic evidence offered to show that the indemnity clause in the contract was not intended to cover injuries to plaintiff's property. Although that evidence was not necessary to show that the indemnity clause was reasonably susceptible of the meaning contended for by defendant, it was nevertheless relevant and admissible on that issue. Moreover, since that clause was reasonably susceptible of that meaning, the offered evidence was also admissible to prove that the clause had that meaning and did not cover injuries to plaintiff's property. Accordingly, the judgment must be reversed.

69 Cal.2d at 40-41, 69 Cal.Rptr. at 566, 442 P.2d at 646 (footnote omitted).

The court went on to specify that extrinsic evidence that may properly be offered to prove the intention of the parties includes evidence as to the "'circumstances surrounding the making of the agreement . . . including the object, nature and subject matter of the writing . . .' so that the court can 'place itself in the same situation in which the parties found themselves at the time of contracting.'" 69 Cal.2d at 40; 69 Cal.Rptr. at 565; 442 P.2d at 645. The California Supreme Court's holding in *Pacific Gas, supra,* has specifically been held to apply to interpretation of insurance policies. See *Diamond v. Ins. Co. of North America,* 267 Cal.App.2d 415, 72 Cal.Rptr. 862 (1968).

Dart is directly on point with the facts of this case. Roberts agreed to indemnify Formica "except for losses resulting from the negligence of [Formica]." Roberts further agreed to maintain insurance for Formica and Cyanamid, "but only as respects the liability of [Roberts] arising from the contract." Similarly, Dart had agreed to indemnify Mack "against any and all claims . . . arising out of use or operation of the vehicle[s]," which the court construed to exclude indemnification for Mack's negligence. 9 Cal.App.3d at 848-49, 88 Cal.Rptr. at 678. Dart also agreed to obtain personal injury and property damage insurance for Mack's benefit. Despite the all-inclusive language of the insurance policy, the *Dart* court found that the parties intended that Dart would obtain insurance *only* for Mack's secondary or derivative liability, and on that basis limited the coverage available to Mack under Dart's policy accordingly.

Mack had been named as an additional insured by endorsement to Dart's policy for all coverage afforded thereunder, subject only to the condition that the insurance was applicable to "liability arising out of the use of automobiles in the business of [Dart]." Similarly, Unigard policy definition 1(b), under which Formica and Cyanamid claim coverage, extends "additional assured" status to entities (although not named) "to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy, but only in respect of operations by or on behalf of the Named Assured . . . ."

As in *Dart*, Formica and Cyanamid claim that, under the language of the insurance policy, they are entitled to coverage even for losses arising from their own fault, despite the fact that Roberts never intended that such coverage be provided. As the *Dart* court stated, the law of California requires that the intent of the parties control over the literal language of the policy.[5] Thus, since it was Roberts' clearly expressed intent and expectation that Formica and Cyanamid would receive coverage only for claims arising from Roberts' liability, California law *requires* that the Unigard policy be construed accordingly. The Roberts/Formica contract expresses the intent of Roberts and Formica, and thus expresses additionally the intent of Unigard, which intended only to carry out Roberts' insurance obligation as set forth in the underlying contract.

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[5]Moreover, under California law, where the reasonable expectations of the named insured and an additional (here unnamed) insured conflict, it is the expectations of the named insured, *i.e.*, Roberts, which control. *Wint v. Fidelity & Casualty Co.*, 9 Cal.3d 257, 264-65, 107 Cal.Rptr. 175, 179-80, 507 P.2d 1383, 1387-88 (1973).

Both the District Court and Ninth Circuit missed completely this well established principle of California law. To consider Formica and Cyanamid additional insureds for all purposes ignores the intent of the parties to the Roberts/Formica contract, in effect rewriting that agreement, so that Roberts and Unigard would be forced to provide insurance far beyond that contemplated or specified in the underlying manufacturing contract. The holdings of the District Court and the Ninth Circuit were thus contrary to the law of California, as expressed by the California Court of Appeal in *Dart, supra,* and its antecedents.

In limited circumstances, where a state has not ruled on a particular point of law, the federal courts have been allowed to ascertain what rule the state court would apply. *Saloomey v. Jeppesen & Co.,* 707 F.2d 671, 674 (2d Cir. 1983). This is not one of those limited circumstances. The California courts have spoken on this issue and there is no indication that the law has changed or should be changed since this pronouncement. In fact, the basic tenet supporting *Dart*—that the intent of the parties to a contract is more important than the strict literal sense of the words used—remains the rule in California. See, *e.g., Leo F. Piazza Paving Co. v. Foundation Constructors, Inc.,* 128 Cal.App.3d 583, 177 Cal.Rptr. 268 (1981); *Western Sierra, Inc. v. Ramos,* 97 Cal.App.3d 482, 158 Cal.Rptr. 753 (1979).

As the foregoing discussion demonstrates, the Ninth Circuit and the District Court were obligated to follow California law in interpreting the Unigard policy. These courts committed grievous error in refusing to construe definition

1(b) of the policy in light of established California case authority. Moreover, if the District Court or the Ninth Circuit believed that there was any doubt as to what coverage Roberts and Formica had intended Roberts to provide, then the factual issue of the parties' intent precluded summary judgment.

THE NINTH CIRCUIT SANCTIONED A SERIOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION

The District Court, while being directed to controlling California authority, refused to apply that authority and instead applied "Ninth Circuit" law.[4] The District Court stated not that its decision represented California law but rather that it believed the Ninth Circuit case more correct. This departure seriously undermines basic concepts of federalism and the rulings of this Court. Since 1938 it has been established that federal courts sitting in diversity actions must apply state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Two years after *Erie*, this Court decided a case very similar procedurally to the present action. In *Six Companies of Cal. v. Joint Highway Dist. No. 13*, *supra*, petitioners contended that under the law of California, a liquidated damages clause did not apply to delay which occurred after the abandonment of work by the contractor. The Circuit Court of Appeals expressly recognized that its decision was contrary to a California Court of Appeal

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[4]*See* text at pp. 8-9 *supra; see also* Appendix E.

decision, but thought that decision wrong and refused to apply it. This Court reversed, directing counsels' attention to a case decided that same day, *West v. American Teleph. & Teleg. Co.*, 311 U.S. 223 (1940). In *West* the Court stated:

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable. *State law is to be applied in the federal as well as the state courts and it is the duty of the former in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule*, however superior it may appear from the viewpoint of "general law" and however much the state rule may have departed from prior decisions of the federal courts.

West, 311 U.S. at 236-237 (emphasis added).

Thus, the federal courts in diversity cases must follow the state court decisions that are rendered in the highest court where a decision may be had. *West*, 311 U.S. at 238.

In the present action, although the District Court and the Ninth Circuit may have thought that they had formulated a superior rule from the viewpoint of "general law", they were obligated under this Court's decisions and the very concept of federalism to follow applicable state decisions. This Court cannot sanction the Ninth Circuit's highly unusual refusal to follow controlling state court decisions.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit. In this instance, the error is so clear that petitioner respectfully suggests that summary reversal and remand are in order. *United States v. Lane Motor Co.*, 344 U.S. 630 (1953); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

DATED: February 10, 1984.

Respectfully submitted,

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(Appendices follow)

Appendix A

In the United States Court of Appeals
For the Ninth Circuit

CA Nos. 82-4326, 82-4444
DC No. 79-3962

Unigard Insurance Company,
Plaintiff-Appellant, Cross-Appellee,

vs.

Formica Corporation and American Cyanamid Company,
Defendants-Appellees, Cross-Appellants.

[Filed Aug. 26, 1983]

MEMORANDUM

Appeal from the United States District Court
for the Northern District of California
Honorable William H. Orrick, District Judge, Presiding
Argued and submitted July 13, 1983

Before: TRASK, ANDERSON, and REINHARDT, Circuit Judges.

Unigard appeals from the district court's grant of summary judgment for Formica. The district court held that Formica was an assured within the coverage of an insurance contract between Unigard and the named assured, Roberts Consolidated Industries. Formica cross-appeals from the district court's denial of attorneys' fees. We address each appeal in turn.

The Grant of Summary Judgment

In reviewing this summary judgment, we view the evidence in the light most favorable to Unigard. We will affirm only if no genuine issue of material fact exists and Formica is entitled to judgment as a matter of law. *See Peacock v. Duval*, 694 F.2d 644, 645 (9th Cir. 1982); *Langager v. Lake Havasu Community Hospital*, 688 F.2d 664, 666-67 (9th Cir. 1982); Fed. R. Civ. P. 56(c).

The dispute in this case focuses on the following language from the insurance contract: "[t]he unqualified word 'Assured,' wherever used in this policy, includes . . . any person, organization, trustee or estate to whom the Named Assured [Roberts] is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy." The district court held that to decide whether Formica was an assured pursuant to this provision, one need determine only whether Roberts had contracted to provide insurance to Formica.

Under California law, an ambiguous insurance clause must be resolved against the insurer. *Reserve Insurance Co. v. Pisciotta*, 30 Cal.3d 800, 807-08, 640 P.2d 764, 768, 180 Cal. Rptr. 628, 632 (1982) (en banc). Therefore, "so long as coverage is available under any reasonable interpretation of an ambiguous clause, the insurer cannot escape liability." *State Farm Mutual Automobile Insurance Co. v. Jacober*, 10 Cal.3d 193, 197, 514 P.2d 953, 954, 110 Cal. Rptr. 1, 3 (1973) (en banc). We believe the district court's interpretation of the ambiguous clause was reasonable. We affirm.

Attorney's Fees

In California, parties to an action may agree to compensation for attorney's fees. Cal. Civ. Proc. Code § 1021. The insurance contract in this case provides:

> The Company hereby agrees . . . to indemnify the Assured for all sums which the Assured shall be obligated to pay by reason of the liability
>
> • • •
>
> (b) Assumed under contract or agreement by the named assured . . . for damages, direct or consequential and expenses, all as more fully defined by the term "ultimate net loss". . . .
>
> The term ultimate net loss is defined:
>
> The term "Ultimate Net Loss" shall mean the total sum which the Assured, or any company as his insurer, or both, become obligated to pay by reason of personal injury, [or] property damage . . . either through adjudication or compromise, and shall also include . . . all sums paid as . . . law costs, . . . expenses for . . . lawyers, . . . and for litigation, settlement, adjustment and investigation of claims and suits which are paid as a consequence of any occurrence covered hereunder.

Formica is an assured. Furthermore, Formica has incurred legal expenses by defending this cause of action brought by Unigard. The issue is whether those expenses were "paid as a consequence of any occurrence covered hereunder."

Applying the California canon of construction that ambiguities in an insurance contract should be interpreted against the insurer, it is reasonable to assume that Formica's attorneys' fees are a "consequence" of the Nebraska

claims arising from the use of Formica 140. Attorneys' fees should have been awarded to Formica.

Conclusion

The district court's grant of summary judgment in favor of Formica is affirmed. The court's judgment denying attorneys' fees to Formica is reversed and remanded for an award of attorneys' fees in the trial court and on appeal.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

Nos. 82-4326, 82-4534
CONSOLIDATED WITH
No. 82-4444

Unigard Insurance Company,
Plaintiff/Appellant,

vs.

Formica Corporation and
American Cyanamid Company,
Defendants/Appellees.

Formica Corporation and
American Cyanamid Company,
Defendants/Cross-Appellants,

vs.

Unigard Insurance Company,
Plaintiff/Cross-Appellee.

[Filed Nov. 14, 1983]

ORDER

Before: TRASK, ANDERSON and REINHARDT,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix C

United States District Court
Northern District of California

No. C 79-3962 WHO

Unigard Insurance Company,
Plaintiff,

vs.

Formica Corporation, et al.,
Defendants.

[Filed May 5, 1982]

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A motion having regularly been made by defendants herein, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for summary judgment in the defendants' favor dismissing the action in its entirety on the ground that there is no genuine issue as to any material fact and the defendants are entitled to judgment as a matter of law,

Now, on considering the authorities submitted by the parties, and the affidavits and declarations submitted therewith, and after hearing counsel for the respective parties, and due deliberation having been had, and the decision of the court having been had, and the decision of the court having been stated orally on the record in open court, it is hereby

ORDERED, ADJUDGED AND DECREED that said motion be and the same hereby is granted and that judgment be entered in the defendants' favor dismissing this action in its entirety, with costs and disbursements to be awarded in favor of the defendants and against the plaintiff.

Dated: May 4, 1982

WILLIAM H. ORRICK
United States District Judge

Appendix D

United States District Court
Northern District of California

No. C 79 3962 WHO

Unigard Insurance Company,
Plaintiff,

vs.

Formica Corporation, et al.,
Defendants.

JUDGMENT

A motion having regularly been made by defendants herein for summary judgment in the defendants' favor dismissing the action in its entirety, and the court having made an order pursuant thereto granting the defendants' motion and directing that judgment be entered herein in the defendants' favor dismissing this action with costs and disbursements to be taxed in favor of the defendants and against the plaintiff, it is hereby

ORDERED, ADJUDGED AND DECREED that the plaintiff take nothing, that the action be dismissed in its entirety, and that defendants recover their costs and disbursements from plaintiff.

Dated: May 4, 1982

WILLIAM H. ORRICK
United States District Judge
United States District Court
Northern District of California

Appendix E

In the United States District Court
For the Northern District of California

Before: The Honorable William H. Orrick, Judge

Civil No. C-79-3962-WHO
Court of Appeals
Docket No. 6968

Unigard Insurance Company,
Plaintiff,

vs.

Formica Corporation, et al.,
Defendants.

EXCERPTS FROM THE
REPORTER'S TRANSCRIPT
MONDAY, NOVEMBER 16, 1981

(Pp. 56, line 17 through 59, line 19)

THE COURT: (Continuing:) This question comes as the threshold question in the case. And, that is, whether or not the provisions of the Unigard policy are to be limited by terms and conditions contained in a contract to which it is not a party. The so-called—I'll call it the Roberts' Contract.

Now, what all this argument has boiled down to finally is an interpretation of the Unigard policy—of the Unigard policy and definition 1(B).

The . . . 1(B) defines the term "assured," as including "Any person, organization, trustee or estate to whom the Named Assured is obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy, but only in respect of operations by or on behalf of the Named Assured or of facilities of the Named Assured or used by them."

Both parties agree that it's necessary to go beyond the insurance policy to determine what person, organization, trustee or estate meets that definition. And both parties agree that they must look at the Roberts' contract.

The defendants' position is that it is necessary only to look at the Roberts-Formica agreement to determine: First, whether the person who claims to be an additional assured is, in the language of the policy, "obligated by virtue of a written contract or agreement to provide insurance such as is afforded by this policy"; and, secondly, to determine whether "operations by or on behalf of the Named Assured or of the facilities of the Named Assured or used by them" are involved.

The position of the defendant is that that is all the information that need be obtained from the Roberts' agreement.

It is the position of the plaintiff Unigard that not only should the court determine that both of those conditions are fulfilled, but that . . . the court should make a determination as to whether there are any limitations on the obligation to provide the insurance contained in the balance of the contract.

I reject the latter interpretation.

It appears to me that the policy on its face is quite clear; and, namely, that it is to provide liability insurance to . . . any person to whom the named assured is obligated by virtue of a written contract to provide insurance such as is afforded by this policy. And that kind of insurance is liability insurance.

And then you can determine the limitation by ascertaining what operations by or on behalf of the named assured exists, or what facilities of the named assured, or used by them, are meant. And that's all. That's all you have to find out.

This determination is strictly a—an interpretation of law. There are no genuine issues of material fact underlying it. And the law in the Ninth Circuit supports, in my view, the court's decision.

The Ninth Circuit law to which I'm referring is Price against Zim Israel Navigation Company, 616 F.2d 422, which is a Ninth Circuit decision decided by Judge Sneed in 1980, in which Judge Sneed made it clear that the obligations of the insurance carrier in that case, under its policies, were not limited in scope by any underlying contract to which it was not a party.

A similar case is Gulf Oil Corporation against Mobil Drilling Barge Margaret, 441 Fed. Supp. 1, in the Eastern District of Louisiana, a case decided in 1975.

The plaintiff relies on a California Court of Appeal case, decided in the Second District by Division Five, and written by a Superior Judge, Judge Frampton, who was assigned pro tem to the court, in which the judge stated,

and I quote in part: It is a general rule that the intent and meaning of the parties is far more important than the strict literal sense of the words used in the insurance contract. For that reason it is equally important to consider the subject matter of insurance and the purpose or object which the parties had in view at that time.

That may be a general principle applicable to the peculiar facts in that case. But I do not think that it applies in the case at bar; and in any event it is—appears to me to be directly contra to the holding of Judge Sneed in the Price case.

Accordingly, I . . . having granted the motion for reconsideration and having heard for the second time the motion for summary judgment, I now reverse my decision in the first hearing, and grant summary judgment in favor of the defendant.